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No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TERESA CASELLA,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

REPLY BRIEF FOR APPELLANT.

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May it Please the Court:

Respondent in his reply brief has left utterly unchallenged all of the 14 cases cited by appellant in her brief supporting her legal contentions. Not one of appellant's 14 cases are mentioned by respondent, much less answered, distinguished or refuted. Respondent has sought to accomplish his purpose by injecting into the case and stressing certain technical points as to legal form which it is submitted are inconsequential and not applicable to this case.

(a) A PETITION FOR A WRIT OF HABEAS CORPUS SIGNED BY ALIEN'S DAUGHTER AND BY THE ALIEN'S ATTORNEY AS SUCH, WHERE THE ALIEN IS IN CUSTODY MEETS THE REQUIREMENTS OF LAW.

It is apparent that respondent has overlooked the fact that appellant's attorney, as such, signed the petition for writ at the end thereof as follows: "Julian D. Brewer, attorney for petitioner and detained herein". (T. 12.)

Appellant's position with regard to this point is amply supported by leading cases.

In *U. S. v. Watchorn,* (C. C. N. Y.) 164 Fed. 152 at page 153, the court in reference to this point said:

> "Notwithstanding the language of Section 754 (R. S.) it has been the frequent practice in this district to present habeas corpus petitions in deportation cases *signed* and verified by others than the persons detained."

In further reference to this situation this court, in *U. S. ex rel. Bryant v. Huston,* (C. C. N. Y.) 273 Fed. 915, said:

> "The practice of a next friend applying for a writ is ancient and fully accepted. There are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint * * * impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the 'next friend' application."

Appellant's position that an application for writ may be made by one person on behalf of another under circumstances similar to those herein is further supported by the following authorities:

In re Hoyle, (D. C. Cal.) 1 Cr. Law Mag. 472; 12 Fed. Cas. No. 6803;

In re Ferrens, (D. C. N. Y.) Fed. Cas. No. 4746;

Ex parte Dostal, 243 Fed. 664.

Under the common law which is controlling, appellant's position in regard to this point is secure.

In *Rex v. Ashby,* 14 How. St. Tr. 814, the House of Lords in England in 1704, resolved

> "that every Englishman who is imprisoned by any authority whatever has an undoubted right, by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due process of law."

In this case, where the appellant's attorney and her daughter signed and verified the petition it cannot be successfully claimed that strangers presented it. Therefore *Ex parte Child,* 15 C. B. 238, and *Ex parte Dorr,* 3 How. 103, cited by respondent are not in point.

Further, the respondent in his reply brief questions for the first time the authority of appellant's attorney and daughter to sign the petition. The general demurrer (T. pp. 14 and 15) made by respondent does not interpose or mention this ground. Neither did appellant's memorandum of points and authorities submitted to the lower court at the hearing and on file below discuss or even mention this point, nor was it mentioned at the hearing by appellant. The point is simply eleventh hour interposition by respondent relating to form only and is without merit.

(b) THE PETITION WAS DEFECTIVE BECAUSE IT ALLEGED FACTS "ON INFORMATION OR BELIEF" WHERE MADE UNDER THE "NEXT FRIEND" PRIVILEGE AND WHERE A COMPLETE COPY OF THE RECORD OF THE IMMIGRATION PROCEEDINGS WAS ANNEXED TO THE PETITION.

Having established that another may apply for a writ under R. S. 754 as interpreted by the courts, in behalf of one detained, it conclusively follows that the application thereunder may be made on "information and belief" and a petition thereon serves the legal purpose of the petition, which is to put the matters in controversy or which are opposed in issue so that a hearing may be had by the court on the merits. The facts surrounding the instant case were not within the personal knowledge of appellant's daughter but she, after studying the record of the immigration authorities in reference thereto, was able to present the petition on "information and belief", the most that she could have possibly done under the circumstances. Granting that if appellant had not been incarcerated she would have been required by law to have made the allegations therein positively because within her personal knowledge, it is submitted that this rule does not apply where another, with no personal knowledge about the matter, makes the petition under the next friend privilege from information gathered from outside sources.

In the instant case the daughter went to a great deal of trouble to secure from the immigration authorities a certified copy of the record, attaching the same to her petition for writ, to make clear to the court the exact basis for her allegations therein made on "information and belief".

Respondent's case of *Hall v. James,* 79 Cal. App. 433, has no application here. In that case, involving a claim by plaintiff for damages for breach of a motion picture contract, the plaintiff alleged on information and belief that he had sustained certain damages. The court held that plaintiff being in the best position to know what the extent of the damages were, could not allege them on "information and belief", and accordingly sustained a *special* demurrer directed to this point. The instant case presents an entirely different situation because (1) here there was no specific demurrer directed to this point (T. pp. 14 and 15) nor even mentioned by respondent in his memorandum of points and authorities on file in the District Court, nor in his argument when he submitted them during the hearing of this matter in the lower court; and (2) the petition for writ here was signed by another, on account of appellant being incarcerated, in behalf of detained, which petitioner had no personal knowledge of the matter and had to obtain from the best available outside source the facts she alleged on information and belief. This further point mentioned in his reply brief for the first time is simply another eleventh hour interposition by respondent relating to form only and is without merit.

(c) THE PETITION FOR WRIT IN THE INSTANT CASE IS NOT "LIKE" THE APPLICATION PRESENTED IN THE FORMER CASE WHICH WAS REFUSED.

Before the honorable lower court signed the order to show cause herein (T. p. 13) he read both the

former petition (U. S. District Court in and for the Northern District of California, Second Division, No. 19,466) and the petition on file herein. It is submitted that the honorable lower court would not have signed the order to show cause in the instant case if the petition therein had been "like" the one presented in the former case.

The facts in reference to this matter are: The former petition was not prepared by Clifford Russell, Esq., who represented appellant before the immigration authorities and who has his office in Sacramento, California, but was prepared by Stephen M. White, Esq., with offices at San Francisco, California, at the request of appellant's said daughter, the latter attorney being retained by her for this purpose on account of him having his office in this city within easy proximity of the court. Said attorney who prepared the first petition being pressed for time and not having available a copy of the record of the proceedings before the immigration authorities, and appellant's said daughter, not being able to make clear to said attorney the basis on which appellant had been ordered deported, alleged grounds in the former petition which were not within the issues whatever, to wit, he alleged, in the absence of accurate knowledge of the facts:

> "First: That there is no evidence to sustain the action of the said Secretary of Labor in his finding that the detained had knowingly shared or received anything or benefit or value from any prostitute and that there is not sufficient or any evidence to support the findings of the said secretary. Second: Your petitioner so alleges upon

> her information and belief that the deportation of the said detained to Canada is illegal and unwarranted in this that the said detained is a subject of Canada * * * (So. Div. U. S. District Court, Second Division, No. 19,466)."

The actual facts were that appellant was ordered deported to Italy on an entirely different charge, to wit, "that she has been found managing a house of prostitution or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes". (Ex. A, p. 23.) The petition presented in the instant case (T. p. 3) alleged entirely different facts in reference to the actual charge, which the first petition did not do, as pointed out. Therefore the claim of respondent in his reply brief that "the discretion of the District Court was well exercised in refusing the writ, because paragraph 9 of the petition showed a prior refusal on a like application" is erroneous. It is respectfully submitted under the facts that the claim by respondent that the two petitions were alike, when he knew from personal knowledge that they were based upon entirely different grounds, is trifling with this honorable court. Having shown that the two petitions were not alike, the cases cited by respondent on this erroneous claim have no applicability.

We have considered the effect of allegations in a petition for writ of habeas corpus made on "information and belief" and have shown that the petition is not, by reason of such allegations, fatally defective as claimed under respondent's caption (d) in his reply brief. We have already discussed (*Hall v. James,*

supra) showing that this case is not applicable. Further it is submitted that *Chin Yow v. U. S.,* 208 U. S. 8, cited by respondent is likewise not applicable.

As to the captions in respondent's brief "(e) The Hearing Was Fair" and "(f) The Hearing Having Been Fair etc.", appellant submits that it is not incumbent on her to answer these, as the respondent has not mentioned, much less answered, any of the cases cited by appellant with specific reference to these points and that the cases cited under said captions by respondent are not applicable. The case of *Leffer v. Nagle,* 22 Fed. (2d) 800, cited by respondent, is distinguished from the instant case by (1) the fact that the Leffer place had a general reputation as being a house of prostitution and that it was this reputation which caused the immigration authorities to inspect the same, and (2) when the Leffer woman was questioned by the immigration officers after her arrest she admitted that she had practiced prostitution on the premises for a period of six months. In the instant case the agents testified (Ex. A, pp. 15 and 16) that they had no information prior to going to the premises that such an act was ever at any time committed on appellant's premises; further, appellant positively testified (Ex. A, pp. 14 and 15) that her lodging house was not a house of prostitution. Further, the unfairness shown with reference to the present case did not apply to the *Leffer* case where the appellant attempted to change her testimony.

CONCLUSION.

Therefore, because respondent in his reply brief has injected into the case and stressed certain technical points as to legal form which are inconsequential and inapplicable, has not answered a single case cited by appellant, and because respondent has not attempted to meet the proof pointed out in appellant's brief that the Washington Board of Review made the false finding to wit (Ex. A, p. 20): "the alien admitted in the preliminary statement * * * that at the time of her arrest in the proceedings she had a girl practicing prostitution in her house, the relief should be granted appellant as prayed for in her brief.

Dated, San Francisco,
October 27, 1928.

Respectfully submitted,
JULIAN D. BREWER,
Attorney for Appellant.